No. 99-843

IN THE

Supreme Court of the United States

MAPLE LANES, INC. d/b/a FRANKIES
and KENNETH J. GEORGE, SR.,

Petitioners,

v.

MEL MESSER, individually and in his official
capacity as SHERIFF OF OGLE COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On May 8, 1996, Melvin C. Messer was the duly elected Sheriff of the County of Ogle, State of Illinois. In serving the residents of Ogle County as the sheriff on that date, he made the following statement to a reporter of the *Rochelle News-Leader*: "We are targeting businesses whose employees are supplementing their income with cocaine and drug sales, just like we did with Frankies in Rochelle." Sheriff Messer's statement referenced the arrests of the assistant manager and a bartender of Frankies in Rochelle, Illinois, for the possession of drugs with the intent to sell following the entry of the premises by members of the Ogle County Sheriff's Department and the City of Rochelle Police Department, pursuant to search warrant, in March of 1996.

Following the filing of a complaint against Frankies alleging various violations of liquor ordinances and laws, a hearing was conducted by the local liquor commissioner on April 30, 1996. Pursuant to the terms of the Illinois Liquor Control Act of 1934 (235 ILCS 5/1-1, *et seq.*), a written finding of fact by the local liquor commissioner was issued on May 2, 1996. After noting that cocaine was found behind the bar in clear bags and that the assistant manager was in the possession of cannabis, a determination was made by the local liquor commissioner that the licensee failed to exercise the degree of control necessary to prevent illegal activity involving controlled substances on the premises. Those circumstances, coupled with three prior violations involving the serving of alcohol to minors on the premises, resulted in a finding by the local liquor commissioner that the liquor license of the establishment should be revoked.

Thereafter, an appeal was taken to the state liquor commission on June 19, 1996. Subsequently, on December 18, 1996, an order was entered by the Illinois State Liquor Commission affirming the decision of the local liquor commissioner to revoke the establishment's license.

A Petition for Rehearing was filed on behalf of the establishment with the State Liquor Commission on January 3, 1997. A consideration of the Petition for Rehearing by the State Liquor Commission resulted in an Order denying that request on January 8, 1997.

In accord with the laws of the State of Illinois, a Complaint was filed on behalf of the establishment seeking administrative review of the local and state proceedings in the Circuit Court of the Fifteenth Judicial Circuit, County of Ogle, on February 6, 1997. After having been pending for approximately six months, an Order of Dismissal was entered by the trial court with regard to the Complaint for Administrative Review on August 7, 1997. The terms of the Order of Dismissal entered by the Circuit Court of Ogle County on that date indicated that the dismissal was by agreement of the parties and with prejudice. The record does not reflect any additional qualifications or explanations as to the basis for the dismissal other than that it terminated the entirety of the establishment's Complaint for Administrative Review.

On May 7, 1997, a cause of action was filed in the Circuit Court of the Fifteenth Judicial Circuit, County of Ogle, on behalf of Maple Lanes, Inc., d/b/a Frankies, and Kenneth George against Sheriff Melvin Messer and the County of Ogle. The theory of liability asserted against Sheriff Messer in the state action was defamation arising from the statements made to the newspaper reporter and published in the newspaper on May 9, 1997.

On July 1, 1997, an Order of Transfer was entered by the presiding judge of the Fifteenth Judicial Circuit, changing the venue in which the state action would proceed from the Circuit Court of Ogle County to the Circuit Court of Lee County. The matter was assigned at the time of the transfer to the Honorable Thomas Magdich.

Subsequently, on May 8, 1997, a First Amended Complaint at Law was filed for the purpose of adding as a party defendant in the state action the *Rochelle News-Leader*. The state action remains pending against both Sheriff Messer and the newspaper at this time.

During the pendency of the action proceeding in the Illinois state court, a cause of action was filed on behalf of Maple Lanes, Inc., d/b/a Frankies, and Kenneth George, pursuant to Section 1983 of the Civil Rights Act of 1964 in the United States District Court for the Northern District of Illinois, Western Division, against Sheriff Melvin Messer. Upon motion of the defendant pursuant to Rule 12(b)(6), an Order of Dismissal was entered by the Honorable Philip Reinhard on November 9, 1998.

From that Order of Dismissal, an appeal was taken by Maple Lanes, Inc., d/b/a Frankies, and Kenneth George to the United States Court of Appeals for the Seventh Circuit. After review of the pleadings submitted and oral argument by counsel, a decision by way of published opinion was forthcoming from the United States Court of Appeals for the Seventh Circuit on July 27, 1999. It is as a result of the decision of the United States Court of Appeals for the Seventh Circuit that this Petition for Writ of Certiorari to the Supreme Court of the United States arises.

REASONS FOR DENYING THE WRIT

I.

APPROPRIATE APPLICATION OF THE ROOKER-FELDMAN DOCTRINE WARRANTS A DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

In petitioning this Honorable Court for a Writ of Certiorari seeking the review of the opinion of the United States Court of Appeals for the Seventh Circuit in this matter, the petitioners claim that there was an unwarranted extension of the Rooker-Feldman doctrine as it was applied to the facts presented for review in the case at bar. In synthesizing the petitioners' position, this asserts that the Rooker-Feldman doctrine was applied inappropriately for the following three reasons: there was not an adequate adjudication of the plaintiff's administrative review in the Illinois state court; there was no involvement in the administrative review process of the defendant in this action, Sheriff Melvin Messer; and there was no symmetry between the matters included in the review process in the Illinois courts and the plaintiffs' action filed pursuant to Section 1983 of the Civil Rights Act.

Contrary to the arguments articulated by the plaintiffs, the interpretation and the application of the Rooker-Feldman doctrine by the United States Court of Appeals for the Seventh Circuit were in accord with both the rationale espoused by the United States Supreme Court in the formulation of the Rooker-Feldman doctrine, as well as the decisions of the twelve federal courts of initial appellate review. Each of the three areas of concern raised by the plaintiffs has been reviewed previously by numerous courts

of review, and consistently has been decided contrary to the positions articulated by the plaintiffs in this action.

At its core, the Rooker-Feldman doctrine is a recognition of the principle that the lower federal courts generally do not have the power to exercise appellate review over state court decisions. *Kamilewicz v. Bank of Boston Corporation*, 92 F.3d 506 (CA 7 1996). The Rooker-Feldman doctrine precludes not only adjudications by federal district courts of the state's highest court, but also the decisions of its lowest courts. *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192 (CA 4 1997).

The foundation of the Rooker-Feldman doctrine is rooted in two statutory bases: first, 28 U.S.C. § 1257 which limits federal review of state court proceedings to the United States Supreme Court; and second, 28 U.S.C. § 1331 which provides that federal district courts are courts of original jurisdiction. *Powell v. Powell*, 80 F.3d 464 (CA 11 1996). In addition to the formal justification for the Rooker-Feldman doctrine as indicated by the aforementioned statutory provisions, there also exists justification based upon the concept that this doctrine affords respect for the decision-making process of state courts. *Gurarino v. Larsen*, 11 F.3d 1151 (CA 3 1993).

With regard to the plaintiffs' concern over the lack of total symmetry between the issues raised in the state court matter and the issues raised in the civil rights action, the clear and the consistent rationale developed by the federal courts of review illustrates that no such condition precedent is mandated for the application of the Rooker-Feldman doctrine. There is no question that the state court proceeding and the federal court proceeding need not be directly on point

for the Rooker-Feldman doctrine to be applicable. *Kamilewicz*, 92 F.3d at 510. Given that fact, a plaintiff may not escape the jurisdictional bar of the Rooker-Feldman doctrine by merely refashioning the attack on the state court judgment as a Section 1983 claim. *Bechtold v. City of Rosemount*, 104 F.3d 1062 (CA 8 1997).

The standard established by the United States Supreme Court in determining whether the application of the Rooker-Feldman doctrine is warranted is premised upon a determination as to whether the state court action and the federal court action are "inextricably intertwined." In discussing the scope of that standard, the United States Supreme Court has stated:

> The federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Penzoil Company v. Texaco, 481 U.S. 1, 107 S. Ct. 1519 (1987).

In creating such a jurisdictional obstacle to collateral review of state court decisions, the Rooker-Feldman doctrine mandates an examination of the gravamen of the plaintiffs' complaint rather than the pleadings of the plaintiffs. In actions filed pursuant to Section 1983, such an analysis requires the court to examine the complaint to determine

whether the litigant challenges the underlying procedure as unconstitutional, or instead, seeks review of the state court judgment in the case. *Young v. Murphy*, 90 F.3d 1225 (CA 7 1996).

Notwithstanding the linguistics of the plaintiffs' complaint, the gravamen of the plaintiffs' § 1983 action concerns the revocation of the liquor license. As succinctly stated by the United States Court of Appeals for the Seventh Circuit, the § 1983 action filed on behalf of the plaintiff is, in essence, an attempt to undo the effect of the ratification of its liquor license by collecting an amount of damages from this defendant for the alleged violation of his constitutional rights. Hence, the claimed loss suffered by the plaintiff arose not from the alleged defamatory remarks of the defendant, but from the actual loss of the ability to generate revenue due to the revocation of the liquor license.

It is exactly that type of scenario which creates the requisite nexus between the state court action and the federal court action for the Rooker-Feldman doctrine to be applicable. The identification of the connection between the two claims and the application of the Rooker-Feldman doctrine as a means to limit the federal district court's jurisdiction over this matter by the United States Court of Appeals for the Seventh Circuit were both reasonable and warranted given the circumstances presented for review.

Secondly, the fact that the defendant in the case at bar was not a participant in the state court action does not obviate the applicability of the Rooker-Feldman doctrine. The plaintiffs' reliance upon the case of *Johnson v. DeGrandy*, 512 U.S. 997, 114 S. Ct. 2647 (1994), to support that proposition both misconstrues the United States Supreme

Court's analysis in that case and places an unwarranted restriction on the scope of the Rooker-Feldman doctrine.

In *Johnson*, this Honorable Court was confronted with a situation where the United States Government sought relief from a decision of the Florida Supreme Court in the United States District Court for the Northern District of Florida. Significantly, the federal government had not been a participant in the prosecution of the action concerning the adequacy of representation of certain minorities in the Florida legislature in the state court action. *Johnson*, 114 S. Ct. at 2654.

In reaching the determination that the Rooker-Feldman doctrine did not bar the federal government's action in the district court, the United States Supreme Court stated:

> It (the United States) was in no position to ask this court to review the state court's judgment and has not directly attacked it in this proceeding.
>
> * * *
>
> The United States merely seeks to litigate its Section 2 case for the first time, and the government's claims, like those of the private plaintiffs, are properly before the federal courts.

Johnson, 114 S. Ct. at 2654

The situation presented to this Honorable Court in the case at bar is diametrically opposed to that which was presented at the time of the Supreme Court's consideration of the *Johnson* case. The significant difference in the case at

bar is that the party seeking relief in the case at bar was a participant in both the administrative matters as well as in the state court action. Moreover, it was the result of those proceedings which was detrimental to the interests of the plaintiffs which actually give rise to the relief sought by the plaintiffs in their action filed pursuant to § 1983 of the Civil Rights Act.

Contrary to the plaintiffs' argument, it is well accepted that the Rooker-Feldman doctrine is applicable even in the absence of the defendant from a state court proceeding where the plaintiff was given an opportunity to press the claim. *Powell*, 80 F.3d at 468. In determining that it is irrelevant as to whether the same defendants are in both the state case and the federal case, it appears that the courts of review have eliminated the prospect of a plaintiff seeking to avoid the applicability of the Rooker-Feldman doctrine merely by changing the *dramatis personae*. *Newman v. State of Indiana*, 129 F.3d 937 (CA 7 1997).

The issue of Sheriff Messer's lack of involvement in the state court action is nothing more than a "red herring" to distract the United States Supreme Court from focusing upon the primary issue in this case. The primary issue is the attempt by the plaintiffs to obtain damages in a federal civil rights action for revenue lost as a result of the revocation of their liquor license resulting from judicial activities at the state level. It is exactly that type of review of a state court decision by a federal court of original jurisdiction that the Rooker-Feldman doctrine is intended to eliminate.

Finally, the suggestion of the plaintiffs that there was not an adjudication made by the Illinois state court relating to the administrative review of their liquor license revocation is contrary to the documentation contained in the state court file.

Following the revocation of the plaintiffs' liquor license by the local liquor commissioner, as well as an order affirming the local commissioner's finding by the state agency, the plaintiffs filed a complaint for administrative review in the Circuit Court of the Fifteenth Judicial Circuit, County of Ogle, on February 6, 1997. After pending for approximately six months, an Order of Dismissal *with prejudice* was entered by the trial court on the plaintiffs' complaint for administrative review on August 7, 1997.

Under Illinois law, a dismissal with prejudice is deemed to be on the merits of the plaintiffs' claim, and is conclusive of the rights of parties as if the matter had been tried and result by final judgment adverse to plaintiff. *Scott Wetzel Services v. Regard*, 271 Ill. App. 3d 478, 648 N.E.2d 1020 (1st Dist. 1995). That rationale is consistent with the spirit of Rule 273 of the Illinois Supreme Court which connotes that a dismissal with prejudice, unless otherwise indicated by order or by statute, operates as an adjudication upon the merits of the case.

Regardless of the plaintiffs' contentions, judicial review of the revocation of the plaintiffs' liquor license was undertaken pursuant to the applicable provisions of the Illinois Administrative Review Act. Further, a final order with regard to the plaintiffs' complaint for administrative review was entered by the presiding court on August 7, 1997.

In light of that fact, there can be no question that a final judgment was entered by the state court before which the plaintiffs' action was filed. The only legal affect of the dismissal of the plaintiffs' complaint for administrative review was to affirm the prior revocation of the plaintiff's liquor license through the local and the state administrative proceedings.

If the plaintiff wished to seek further review of that dismissal, the appropriate form should have been the Illinois Appellate Court. In correctly recognizing that fact, the United States Court of Appeals for the Seventh Circuit identified the plaintiffs' attempt to circumvent the review process by filing the federal action pursuant to Section 1983 of the Civil Rights Act. Because the federal district court did not possess the requisite jurisdiction to serve in the capacity of a court of review, the United States Court of Appeals for the Seventh Circuit correctly utilized the Rooker-Feldman doctrine to mandate the dismissal of the federal claim.

II.

DIRECT CAUSE, NOT PROXIMATE CAUSE, FOR LOSS OF A PROPERTY RIGHT IS THE UNIFORM STANDARD UTILIZED TO ASSESS SATISFACTION OF "STIGMA-PLUS" TEST IN SECTION 1983 ACTIONS

In addition to the request for review of the application of the Rooker-Feldman doctrine, the plaintiffs contend that this action also presents the United States Supreme Court with an opportunity to establish a uniform interpretation and application of the "stigma-plus" analysis in actions where the plaintiff asserts a loss of a protected property right in an action filed pursuant to Section 1983 of the Civil Rights Act of 1964. The plaintiffs premise their request for review upon the belief that there is a divergence among the various circuits regarding the type of "cause" needed by the state actor who promulgated the alleged defamatory remarks to satisfy the "plus" portion of the stigma-plus analysis. Although the defendant certainly recognizes the role of this Honorable Court in insuring application of federal laws and principles, it is respectfully submitted that no such lack of uniformity

exists with regard to the interpretation and the application of the "stigma-plus" analysis in non-employment situations.

Contrary to the plaintiffs' position, numerous judicial circuits which have interpreted and have applied the "stigma-plus" analysis in Section 1983 cases involving non-employment-related issues have been steadfast in their requirement of a direct causal connection between the alleged state action and the loss of the protected property right. *Margoles v. Formey*, 643 F.2d 1292 (CA 7 1981); *Wade v. Goodwin*, 843 F.2d 1150 (CA 8 1988); *Castaneda v. United States Department of Agriculture*, 807 F.2d 1478 (CA 9 1987); *Phelps v. White Eagle-Beacon*, 886 F.2d 1262 (CA 10 1989); *Cypress Insurance Company v. Clark*, 144 F.3d 1435 (CA 11 1998).

In each of the aforementioned cases, the respective courts of review have premised the standard requiring direct injury by the state actor to satisfy the "stigma-plus" analysis upon this Honorable Court's discussion of the issue in the case of *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155 (1976).

As stated in Paul, defamatory publications by a state official, however seriously they may harm someone, do not deprive that person of any interest protected by the due process clause. *Paul*, 96 S. Ct. at 1165. At best, such situations create the potential for a viable defamation action against the public official by the aggrieved party before a state tribunal.[1]

1. It should be noted that at the time of the preparation of this pleading, there is pending a cause of action asserted on behalf of the plaintiffs against the Defendant, Sheriff Melvin Messer, based upon a theory of defamation in the Circuit Court of the Fifteenth

(Cont'd)

In support of the contention that there exists a schism among the circuits with regard to the application of the "stigma-plus" analysis in non-employment-related situations, the plaintiffs solely rely upon the case of *San Jacinto Savings & Loan v. Kacal*, 928 F.2d 697 (CA 5 1991). It is the plaintiffs' mistaken belief that the rationale utilized by the United States Court of Appeals for the Fifth Circuit in deciding *Kacal* requires only proximate cause rather than direct cause between the state action and the deprivation of the protected interest. Notwithstanding the plaintiffs' argument, closer scrutiny of the opinion generated by the Fifth Circuit in *Kacal* indicates otherwise.

In *Kacal*, the aggrieved party asserted that the municipal defendant violated her liberty and property interests in the operation of her business by allegedly defaming her and harassing her customers. *Kacal*, 928 F.2d at 700. In determining that the situation at bar satisfied the "stigma-plus" analysis, the Fifth Circuit focused upon the actions of the municipal actor in conjunction with the alleged defamatory remarks.

In reviewing the Record on Appeal, the Fifth Circuit noted that it contained evidence that the municipal police officers continually harassed the young and easily intimidated patrons of the aggrieved party's business, thereby causing a decline in the business' patronage. *Kacal*, 928 F.2d at 703. Given the actions of the municipal officers resulting

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Judicial Circuit, County of Lee, before the Honorable Thomas Magdich under Case No. 97 L 30, entitled *Maple Lanes, Inc., d/b/a Frankies, and Kenneth J. George, Sr. v. Mel Messer, individually and in official capacity as Sheriff of Ogle County, and News Media Corporation, d/b/a Rochelle News Leader.*

in the harassment of the claimant's patrons in front of the business, the United States Court of Appeals for the Fifth Circuit stated:

> Kacal does not and need not show that the alleged defamatory remarks actually caused the decline in patronage. Instead, it is sufficient to show that the officer's harassment of Kacal's patrons was, as the summary judgment evidence indicates, the *direct* cause of the failure of her business.

Kacal, 928 F.2d at 703 (emphasis added)

Given the analysis undertaken by the United States Court of Appeals for the Fifth Circuit in *Kacal*, it is readily apparent that it, like the other circuits, utilized a direct cause standard in applying the "stigma-plus" test. In light of that fact, it is difficult to discern the nature of the conflict among the circuits in the interpretation and the application of the "stigma-plus" analysis in cases of this nature as described in the plaintiffs' petition.

It is plainly obvious that the rationale utilized by the district court in granting the defendants' Motion to Dismiss was consistent not only with the application of the "stigma-plus" analysis by the United States Court of Appeals for the Seventh Circuit as articulated in the *Margoles* case, but also consistent with the same rationale utilized by the various judicial circuits in applying the same legal principle. Contrary to the plaintiffs' belief, there does not exist a conflict among the circuits with regard to the interpretation and the application of the "stigma-plus" test in non-employment scenarios where a claimant has filed an action pursuant to Section 1983 of the Civil Rights Act of 1964. Given the lack

of any such conflict, there exists no basis to support the plaintiffs' request contained in their petition for review of this issue.

CONCLUSION

Neither the application of the Rooker-Feldman doctrine by the United States Court of Appeals for the Seventh Circuit nor the application of the "stigma-plus" analysis by the district court was in derogation of the well-established legal principles governing each issue. To the contrary, the decision-making processes exercised by both courts conformed with the longstanding legal principles enunciated by the United States Supreme Court regarding both the Rooker-Feldman doctrine and the "stigma-plus" analysis. For those reasons, the Defendant, Sheriff Melvin Messer, respectfully requests that the United States Supreme Court deny the plaintiffs' Petition for a Writ of Certiorari.

Respectfully submitted,

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